

Department of Fish and Wildlife POL-M5002

POLICY TITLE: Requiring or Recommending Mitigation

Replaces:

See Also: WDW POL 3000, 3001 and 3002,
all dated 10/1/92; WDW POL 3003,
dated 9/16/92; WDF Policy 410,
dated 9/10/90; and WDF Policy 404,
dated 5/1/87
Commission Policies

POL-M5002 REQUIRING OR RECOMMENDING MITIGATION

This policy applies to all habitat protection assignments where the Washington Department of Fish and Wildlife (WDFW) is issuing or commenting on environmental protection permits, documents, or violation settlements; or when seeking commensurate compensation for impacts to fish and wildlife resources resulting from oil or other toxic spills.

1. Goal is to achieve no loss of habitat functions and values.

The goal of WDFW is to maintain the functions and values of fish and wildlife habitat in the state. We strive to protect the productive capacity and opportunities reasonably expected of a site in the future. In the long-term, WDFW shall seek a net gain in productive capacity of habitat through restoration, creation, and enhancement. Mitigation credits and debits shall be based on a scientifically valid measure of habitat function, value, and area. Ratios shall be greater than 1:1 to compensate for temporal losses, uncertainty of performance, and differences in functions and values.

2. WDFW uses the following definition of mitigation; avoiding impacts is the highest mitigation priority.

"Mitigation" means actions that shall be required or recommended to avoid or compensate for impacts to fish, wildlife, or habitat from the proposed project activity. The type(s) of mitigation required shall be considered and implemented, where feasible, in the following sequential order of preference:

- Avoiding the impact altogether by not taking a certain action or parts of an action.
- Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- Compensating for the impact by replacing or providing substitute resources or environments.

- Monitoring the impact and taking appropriate corrective measures to achieve the identified goal.

3. WDFW requires mitigation when issuing environmental permits or documents.

4. WDFW recommends mitigation on permits or documents issued by other agencies.

5. Complete mitigation ensures no loss of habitat functions or values, or populations.

Complete mitigation is achieved when mitigation elements in number 2 (A-F) ensures no loss of habitat functions or values, or fish and wildlife populations. Habitat loss and mitigation success shall be measured with the Habitat Evaluation Procedure (HEP) or other method acceptable to WDFW.

6. On-site in-kind mitigation is the highest priority.

WDFW priorities for mitigation location and type, in the following sequential order of preference, are:

On-site, in-kind.

Off-site, in-kind.

On-site, out-of-kind.

Off-site, out-of-kind.

For off-site mitigation to be accepted, the project proponent must demonstrate to WDFW's satisfaction that greater habitat function and value can be achieved off-site than on-site.

Combination of the four types may be accepted. "On-site" means on or adjacent to the project impact site. "In-kind" means the same species or habitat that was impacted.

Out-of-kind mitigation is not acceptable for impacts to priority habitats and species, with two exceptions: (1) priority habitats and species that are at greater risk can be substituted for impacted priority habitats and species; and (2) for hydraulic projects, WDFW shall consider off-site and/or out-of-kind mitigation where equal or better biological functions and values are provided (see number 8 below). Priority habitats, and habitats of priority species, may be replaced at a level greater than the impacts of the project on those habitats and species.

7. For off-site fish mitigation, mitigation must occur in the same Water Resource Inventory Area (WRIA) as the impacts.

Exceptions to the above must be approved by the director.

For federal endangered or threatened species, mitigation must occur within the habitat supporting the same Evolutionary Significant Unit (ESU).

8. WDFW may not limit mitigation to on-site, in-kind mitigation when making decisions on hydraulic project approvals for infrastructure development projects.

The State Legislature has declared that it is the policy of the state to authorize innovative mitigation measures by requiring state regulatory agencies to consider mitigation proposals for infrastructure projects that are timed, designed, and located in a manner to provide equal or better biological functions and values compared to traditional on-site, in-kind mitigation proposals. For these types of projects, WDFW may not limit the scope of options in a mitigation plan to areas on or near the project site, or to habitat types of the same type as contained on a project site. When making a permit decision, WDFW shall consider whether the mitigation plan provides equal or better biological functions and values, compared to the existing conditions, for the target resources or species identified in the mitigation plan. The factors WDFW must consider in making this decision are identified in RCW 90.74.020 (3). Also see RCW 75.20.098 and Chapter 90.74 RCW.

9. When WDFW is issuing a Hydraulic Project Approval in relation to state or federal cleanup sites, and WDFW is the sole decision-maker, WDFW can only require mitigation if the sediment dredging or capping actions do not result in a cleaner aquatic environment and equal or better habitat functions and values.

When other agencies are decision-makers, recommendations for mitigation may be made under other state or federal authority to protect habitat functions and values.

10. When WDFW is issuing a Hydraulic Project Approval and is the sole decision-maker, WDFW can request, but cannot require "habitat mitigation" for maintenance dredging of existing navigable channels and berthing areas.

The phrase, "habitat mitigation" is analogous to compensatory mitigation. See RCW 75.20.325. When other agencies are decision-makers, recommendations for mitigation may be made under other state or federal authority to protect habitat functions and values.

11. Preserving at-risk, high quality priority habitat may be considered as part of an acceptable mitigation plan.

When high quality areas of priority habitats or habitats of priority species are at risk, preservation of those habitats may be accepted as part of a mitigation plan, as long as there is no loss of habitat function.

12. Habitat replacement is preferred to hatcheries for fish mitigation.

Commission policy directs WDFW to give priority to natural production rather than hatchery production, within habitat capabilities.

13. Mitigation game fish may be purchased from aquatic farmers. If WDFW requires, as part of a mitigation agreement, that resident hatchery game fish be stocked, RCW 77.18.020 requires that WDFW notify the project proponent that the fish may be purchased from a private aquatic farmer. WDFW shall specify fish health requirements, pounds or numbers, species, stock, and/or race of the fish to be provided.

14. Where authority exists, strive to maintain recreational and harvest opportunities.

15. Approved habitat mitigation measures shall be based on best available science.

16. Mitigation plans shall be required for a project with significant impacts. Mitigation plans shall include the following:.

- Baseline data
- Estimate of impacts
- Mitigation measures
- Goals and objectives
- Detailed implementation plan
- Adequate replacement ratio
- Performance standards to measure whether goals are being reached
- Maps and drawings of proposal
- As-built drawings
- Operation and maintenance plans (including who will perform)
- Monitoring and evaluation plans (including schedules)
- Contingency plans, including corrective actions that will be taken if mitigation developments do not meet goals and objectives
- Any agreements on performance bonds or other guarantees that the proponent will fulfill mitigation, operation and maintenance, monitoring, and contingency plan.

17. Proven mitigation techniques must be used.

Experimental mitigation techniques are allowable only if advance mitigation is being performed and will be fully functional prior to the project impacts.

18. Mitigation shall proceed along with project construction.

Mitigation measures are an integral part of a construction project and shall be completed before or during project construction, except projects with impacts that have no proven mitigation techniques. Those projects require advance mitigation.

19. Delayed mitigation shall include replacement that is greater than losses.

Mitigation that is implemented after project construction, or that requires a long time to reach replacement value, shall include additional habitat value (over and above replacement value) equal to the loss through time.

20. WDFW shall determine impacts and mitigation.

WDFW shall determine the project impact, significance of impact, amount of mitigation required, and amount of mitigation achieved, based on the best available information, including the applicant's plans and specifications.

For large projects with potentially significant impacts, this will be based on review of studies approved by WDFW.

21. Cumulative impacts of projects shall be considered.

Cumulative impacts of projects shall be considered and appropriate measures taken to avoid or minimize those impacts.

22. Project proponent pays mitigation costs.

Mitigation costs may include but are not limited to:

- Studies to determine impacts and mitigation needs.
- Alteration of project design.
- Planning, design, and construction of mitigation features.
- Operation and maintenance of mitigation measures for duration of project (including personnel).
- Monitoring of mitigation measures and fish and wildlife response.
- All WDFW costs including engineering analysis and input.

23. Performance bond or other monetary assurance may be accepted.

A performance bond, letter of credit, escrow account, or other written financial guarantee may be accepted to ensure that the project proponent will fulfill mitigation requirements, operation and maintenance, monitoring, and contingency plans. The amount of the bond should cover the costs plus 10 percent.

24. Mitigation site shall be protected for the life of the project.

The mitigation site shall be protected permanently, or at a minimum, for the life of the project. This protection shall be through conservation easement, deed restriction, donation to WDFW, or other legally binding method.

25. WDFW shall seek mitigation for unmitigated projects.

WDFW shall seek mitigation for unmitigated or undermitigated existing projects. Criteria for prioritizing unmitigated projects are:

- Fish and wildlife losses from the project.

- Potential gains of fish and wildlife.
- Likelihood of achieving mitigation.
- Time required to achieve mitigation.
- Support from other agencies and tribes.
- Presence of priority habitats and species.
- Cost to WDFW.

26. Compliance monitoring shall be performed as funding allows.

27. Mitigation banking may be an acceptable form of mitigation. The term "mitigation bank" as used here refers to a habitat creation, restoration, or enhancement project undertaken by a project proponent to act as a bank of credits to compensate for habitat impacts from future development projects. Credits and debits shall be based on area or a scientifically valid measure of habitat function and value acceptable to WDFW, such as the Habitat Evaluation Procedure (HEP). The use of credits from a mitigation bank as a form of compensation shall occur only after the standard sequencing of mitigation negotiations (avoid, minimize, rectify, reduce, and then compensate). Habitat units may be traded or sold.

28. Terms of mitigation must be documented.

A mitigation contract is necessary to document the terms of the mitigation. Mitigation contracts may take several forms:

- Mitigation agreement (must be approved by Office of Attorney General).
- Federal Energy Regulatory Commission (FERC) order.
- Conditions on an environmental permit.
- Statements in a final environmental impact statement.
- Conservation easement.
- Energy Facility Site Evaluation Council (EFSEC) site certification.
- Landowner Landscape Plan.

29. Habitat and Lands Services Program coordinates all mitigation projects except Columbia and Snake River mainstem fish mitigation projects that are coordinated by the Intergovernmental Fisheries Program.

The program that coordinates the mitigation projects is responsible for coordinating with all other programs and regions that have interest or involvement in the project.

30. Facilities shall be transferred to the appropriate program for management.

When mitigation planning is completed, responsibility for any facilities (land, fish cultural facility, etc.) shall be transferred to the appropriate program and region. During the latter stages of planning, the managing program shall be phased into the process.

31. Managing programs shall follow the mitigation contract. The program and region managing a mitigation facility or project shall follow the terms of the mitigation contract at all times. No deviations shall be made from the mitigation contract unless approved by the program that negotiated the contract.